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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MALIBU MEDIA, LLC, Plaintiff, v. ROBERT LEE, Defendant.	Civil No. 2:14-cv-05375-SRC-CLW

PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiff Malibu Media, LLC ("Plaintiff"), by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 12(f), moves for the entry of an order striking the affirmative defenses asserted by Defendant Robert Lee ("Defendant"), and states as follows:

I. INTRODUCTION & PROCEDURAL BACKGROUND

Plaintiff commenced this copyright infringement action against Defendant on August 27, 2014 [CM/ECF 1], and filed an amended complaint on January 28, 2015, through which it alleges that Defendant has copied and distributed eighteen (18) of Plaintiff's copyrighted works, all without Plaintiff's consent [CM/ECF 11]. Plaintiff asserts a claim for direct copyright infringement, and requests that (i) Defendant delete and permanently remove, and be enjoined from continuing to infringe, Plaintiff's copyrighted works and (ii) Plaintiff be awarded its statutory damages and reasonable attorneys' fees and costs pursuant to 17 U.S.C. §§ 504–05 [*Id.*].

On February 22, 2015, Defendant filed his answer, generally denying that he ever distributed or downloaded any of Plaintiff's movies and purporting to raise seventeen affirmative defenses [CM/ECF 14]. As set forth below, Plaintiff now moves under Rule 12(f) to strike Defendant's seventeen so-called affirmative defenses.

II. MEMORANDUM OF LAW

"The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Although motions to strike are often viewed with disfavor because of their potential to be used dilatorily, they "serve a useful purpose in eliminating [repetitive or] insufficient defenses and thus sav[e] the time and expense which would otherwise be spent in litigating issues which would not [a]ffect the outcome of the case." *Newborn Bros. Co., Inc. v. Albion Eng'g Co.*, 299 F.R.D. 90, 93 (D. N.J. 2014); *U.S. v. Geppert Bros., Inc.*, 638 F.Supp. 996, 998 (E.D. Pa. 1986). Accordingly, a court should strike an affirmative defense "when it is legally insufficient to prevent recovery under any state of facts reasonably able to be inferred from the well plead allegations of the answer." *Id.* Stated differently, an affirmative defense should be stricken pursuant to Rule 12(f) when it is inapplicable to the cause of action or otherwise insufficient as a matter of law, as is the case where it cannot succeed under any set of facts which may be inferred from the allegations of the pleading. *See Ioselev v. Schilling*, No. 09-6039, 2010 WL 3724130, *2–3 (D. N.J. Sept. 15, 2010); *In re Gabapentin Patent Litig.*, 648 F. Supp. 2d 641, 647–48 (D. N.J. 2009); *see also Alliance Indus. Ltd. v. A-1 Specialized Servs. & Supplies, Inc.*, No. 13-2510, 2014 WL 4548474, *2 (E.D. Pa. Sept. 11, 2014) (acknowledging that even if the *Iqbal/Twombly* pleading standard is inapplicable to affirmative defenses—an unsettled issue in the Third Circuit—"a defendant must nevertheless state some basis for asserting an affirmative defense, and may not merely recite all potential affirmative defenses available"); *Collura v. Ford*, No. 13–4066, 2014 WL 3437733, *26–27 (E.D. Pa. July 15, 2014) ("Still, even though *Twiqbal*'s heightened standard [may] not apply, Federal Rule of Civil Procedure 8 requires responsive pleadings to 'state in short and plain terms the party's defenses.' Even before *Twombly* and *Iqbal*, affirmative defenses had to provide the plaintiff with fair notice of the nature of the defense, and so bare bones conclusory allegations have always been at risk of being struck.").

A. Defendant's First and Third Affirmative Defenses

Defendant's first affirmative defense states that "Defendant owed no duty to plaintiff." His third affirmative defense is that "[a]ny damage suffered by plaintiff was due to conduct of third parties or the co-defendants over whom this defendant had no control…." Although these defenses are viable for negligence actions, they are plainly inapplicable to a copyright infringement claim since same is a strict liability tort. Accordingly, because the claim at issue is one for direct copyright infringement under the Copyright Act, it is irrelevant that Defendant owed no independent duty to Plaintiff or that there were additional defendants who may have also used Defendant's internet to infringe upon Plaintiff's works. *See Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 878 (3d Cir. 1982); *see also*

Warner Bros. Records Inc. v. Walker, 704 F. Supp. 2d 460, 464–65 (W.D. Pa. 2010) ("Once a plaintiff has proven that he or she owns the copyright on a particular work, and that defendant has infringed upon those exclusive rights, the defendant is liable for infringement and this liability is *absolute*.").

B. Defendant's Second, Seventh, Eighth, and Ninth Affirmative Defenses

Defendant's second, seventh, eighth, and ninth affirmative defenses similarly fail, as none are applicable to the instant case. Defendant's second affirmative defense contends that Plaintiff fails to state a claim upon which relief can be granted because "the applicable statute of limitations has expired on plaintiff's works" [CM/ECF 14]. This failure-to-state a claim defense is procedurally improper and both factually and legally incorrect. Procedurally, Defendant's second defense may be stricken with prejudice since it was not raised in conjunction with a motion to dismiss prior to the filing of an answer. *Accord, e.g.*, *Harvey v. Lake Buena Vista Resort, LLC*, 568 F.Supp.2d 1354, 1360 n.5 (M.D. Fla. 2008) ("The Resort also sets forth an affirmative defense, in its Answer, of failure to state a claim upon which relief may be granted, *i.e.*, the grounds for a Rule 12(b)(6) motion. However, any such motion to dismiss on Rule 12(b)(6) grounds must be made *before* an answer is filed. The Resort did not file a motion to dismiss before filing its Answer; thus, procedurally, the Resort cannot assert an 'affirmative defense' for failure to state a claim at this stage…."). In addition to its procedural impropriety, Defendant's second affirmative defense is plainly without merit because Plaintiff has expeditiously brought this action well within the three year limitation period established by 17 U.S.C. § 507(b). *See, e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1972–73 (2014) (explaining that a laches or statute of limitations defense cannot be invoked to preclude a copyright infringement claim if the claim is brought within the Copyright Act's three-year limitations period). Here, Plaintiff commenced this action on August 27, 2014 [CM/ECF 1], and so the statute of limitations expired on claims that accrued prior to August 27, 2011. Every single one of Defendant's infringements is alleged to have occurred between December 22, 2013 and June 25, 2014 (*i.e.*, after August 27, 2011 and well within the applicable limitations period).

Defendant's seventh affirmative defense, which is premised upon plaintiff's purported failure to "mitigate any damages," fares no better. Where, as here [CM/ECF 11], a copyright holder elects to recover statutory damages instead of actual damages, a failure-to-mitigate defense is rendered inappropriate and inapplicable. *See* 17 U.S.C. § 504(c)(1) (noting that a copyright owner may elect to recover statutory damages "instead of" actual damages); *Arista Records, Inc. v. Flea World, Inc.*, 356 F. Supp. 2d 411, 422 (D. N.J. 2005); *see also Purzel Video GmbH v. St Pierre*, 10 F. Supp. 3d 1158, 1169 (D. Colo. 2014) ("A copyright plaintiff's exclusive pursuit of statutory damages invalidates a failure-to-mitigate defense."); *Malibu Media, LLC v. Fitzpatrick*, No. 1:12-cv-22767, 2013 WL 5674711, *3 n.17 (S.D. Fla. Oct. 17, 2013) (holding that an election of statutory damages precludes the defense of failure to mitigate damages); *Clements v. HSBC Auto Fin., Inc.*, 2010 WL 4281697, *11 (S.D. W.Va. 2010) ("[T]he Court finds that there is no genuine issue of material fact as to whether Plaintiffs failed to mitigate their damages as this affirmative defense is not applicable to the imposition of statutory damages.").

Defendant's eighth affirmative defense argues that Plaintiff's action is barred due to its failure "to join a party without whom the action cannot proceed." Defendant does not identify who he believes is indispensable to this action, nor does he articulate why that person is "indispensable." These failures in and of themselves are fatal to Defendant's eighth affirmative defense. *Cf. Federal Deposit Ins. Corp. v. Beall*, 677 F. Supp. 279, 283 (M.D. Pa. 1987) (dispensing with a failure-to-join-indispensable-party argument where defendants "have not clearly identified which parties are purportedly indispensable"); *Joe Hand Promotions, Inc. v. Havens*, No. 2:13-cv-0093, 2013 WL 3876176, *3 (S.D. Ohio July 26, 2013) (striking affirmative defense because defendant "fail[ed] to identify any alleged indispensable party and utterly fail[ed] to explain why any such party cannot be joined"); *Hammer v. Peninsula Poultry Equip. Co., Inc.,* No. RDB–12–1139, 2013 WL 97398, *7 (D. Md. Jan. 8, 2013) ("[T]his particular defense should include not only the title of the defense but also the name of the party required to be joined, and, if possible, the required party's citizenship and a statement regarding the court's jurisdiction over the case if he were joined.”).

Even were Defendant to (1) admit that his wireless internet was utilized to infringe Plaintiff's copyrights and (2) identify the individual responsible for the infringements, Defendant's eighth affirmative defense would still fail because there has been no failure to join an indispensable party; “the mere fact that a defendant points to the liability of another person does not render that other person indispensable to the litigation.” *Joe Hand*, 2013 WL 3876167 at *3; *see also Huber v. Taylor*, 532 F.3d 237, 250 (3d Cir. 2008) (“[A] person's status as a joint tortfeasor does not make that person a necessary party, much less an indispensable party.” (citing *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 204 (6th Cir. 2001))). Indeed, Federal Rule of Civil Procedure 19(a)(1) narrowly defines an “indispensable party” as one (a) whose joinder is necessary to “accord complete relief among existing parties” or (b) who “claims an interest relating to the subject of the action ….” Fed. R. Civ. P. 19(a)(1). Here, quite obviously, there is no person whose joinder is necessary to adjudicate Plaintiff's claims as between Plaintiff and Defendant, nor is there anyone who has claimed an interest in Defendant's use of BitTorrent to illegally infringe Plaintiff's works. *See, e.g.*, *Malibu Media, LLC v. John Doe 1*, No. 12–2078, 2013 WL 30648, *10 (E.D. Pa.

Jan. 3, 2013) ("To prevail against [Defendant], Malibu needs to prove that [he] downloaded its copyrighted material without authorization. The court will be able to adjudicate these matters and to 'accord complete relief' whether or not other [unknown individuals], who allegedly also infringed Malibu's works, are present.").

As his ninth affirmative defense Defendant asserts that "Plaintiff is not licensed to do business within the State of New Jersey and is barred from filing suit herein." Defendant offers absolutely no support for this contention and does not cite to any New Jersey statute. Regardless, Defendant's ninth affirmative defense flies in the face of Federal Rule of Civil Procedure 17(b)(3)(A), which allows an out-of-state limited liability company like plaintiff to sue for a federal claim *regardless of its licensure in the forum state.* *See* Fed. R. Civ. P. 17(b)(3)(A) ("a[n] unincorporated association with no such capacity under that state's law *may sue* or be sued in its common name *to enforce a substantive right existing under the United States Constitution or laws*"); *Alpha Waste Sys., LLC v. Res. Reclamation Toledo, LLC*, 2014 WL 1788576, at *1 (N.D. Ohio 2014) ("Alpha is an unincorporated association because it is a limited liability company …."); *see also Zuffa, LLC v. Thomas*, 2012 WL 6617334, at *2 (D. Md. 2012) (state statute requiring an LLC to register before suing did not prevent the LLC-plaintiff from bringing a copyright lawsuit in federal court); *Tran Enterprises, LLC v. Dao*, 2010

WL 5092968, at *4, n.16 (S.D. Tex. 2010) (same). *See also Jane Lyons Adver., Inc. v. Cook*, 1998 WL 164775, at *4 (D.D.C. 1998) (refusing to apply the state registration statute to a claim brought under the Copyright Act, and noting "this court is not sitting in diversity and therefore is under no obligation to apply the District's door closing statute."). Additionally, the Copyright Act sets forth the only requirements to bring a copyright claim, and state licensure in the federal court's forum state is not listed as a requirement. *See* 17 U.S.C. §§ 301, 501(b). Because nothing in the Copyright Act requires a copyright holder to be licensed in the district where it seeks to enforce its copyrights, such a requirement is inconsistent with, and therefore preempted by, the Copyright Act. *See Petrella*, 134 S.Ct. at 1974 (recognizing the Copyright Act preempts the field for copyright claims so as to negate the applicability of inconsistent state statutes, claims, doctrines, and defenses); *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004) ("[T]he complete preemption doctrine [extends] to any federal statute that both preempts state law and substitutes a federal remedy for that law… The Copyright Act does just that."). *See also, e.g.*, *Citibank N.A. v. City of Burlington*, 971 F. Supp. 2d 414, 436 (D. Vt. 2013) ("Vermont may not require a national bank to register as a foreign corporation before it maintains a lawsuit in a court within the state; such requirements plainly conflict with [the federal statute allowing banks to "sue and be sued, complain and defend, in any court of law and equity"], and are therefore preempted."). Finally, holding that Plaintiff cannot enforce its rights in this court (the only court that has jurisdiction over Defendant) would violation the Petition and Commerce clauses of the United States Constitution. *See Whalen v. County of Fulton*, 126 F.3d 400, 406-07 (2d Cir. 1997) ("The constitutional right of access [to the courts] is violated where government officials obstruct legitimate efforts to seek judicial redress."); *Radio WHKW, Inc. v. Yarber*, 838 F.2d 1439, 1443 (5th Cir. 1988) ("Where the business of the foreign corporation is interstate in nature, a state may not burden such business with state qualification requirements unless the business [ ] includes a distinct and separable intrastate focus [or localization]").

C. Defendant's Fourth, Fifth, Sixth, Fourteenth, and Sixteenth Affirmative Defenses

Defendant's fourth, fifth, sixth, fourteenth, and sixteenth affirmative defenses also fail, as they are inadequately alleged and wholly fail to put Plaintiff on notice as to their bases or contextual applications. Stated differently, Defendant falls woefully short of discharging his relatively lax pleading burden in raising these five affirmative defenses, equitable defenses that are "rarely applicable" in the context of direct copyright infringement. In raising these defenses, Defendant merely recites boilerplate legal conclusions. He does not allege any factual basis for any of these defenses; he neglects to discuss the elements of the defenses, and he wholly fails to proffer any basis upon which this Court could ever find that any of them could ever apply. In their entirety, these defenses read as follows:

> Plaintiff's claim is barred by the doctrine of laches.
>
> Plaintiff's claim is barred by the doctrine of unclean hands.
>
> Plaintiff's claim is barred by the doctrine of estoppel.
>
> Plaintiff has forfeited its rights in the works alleged in the Complaint.
>
> Plaintiff has abandoned the copyrights of the works alleged in the Complaint.

Precisely because none of these defenses contain any discussion or factual allegations, Plaintiff is not fairly put on notice as to their nature and basis (making it nearly impossible for Plaintiff to meaningfully and substantively address them). Such boilerplate pleading is in direct violation of the federal rules and has never been deemed sufficient. Defendant's pleading failures are thus fatal; Third Circuit precedent (as well as precedent nationwide) instructs that affirmative defenses cannot survive a motion to strike when they merely consist of boilerplate, unsubstantiated and unsupported legal conclusions. *Accord, e.g.*, *Alliance Indus.*, 2014 WL 4548474 at *2; *Collura*, 2014 WL 3437733 at *26–27; *Ioselev*, 2010 WL 3724130, *2–3; *In re Gabapentin Patent Litig.*, 648 F. Supp. 2d at 647–48.

Defendant's pleading failures are particularly egregious and fatal as to these five equitable defenses because they are rarely applicable in the copyright infringement context and are viable only when based upon particularized factual allegations. Defendant's equitable defenses of laches,[1] unclean hands, estoppel, forfeiture, and abandonment are deemed legally sufficient in the direct copyright infringement context only when the defendant alleges factual assertions to show that the plaintiff has engaged in a "protracted acquiescence" that induced the defendant to rely to its detriment (in the case of a laches defense), has engaged in a transgression of "serious proportions [that] relates directly to the subject matter of the infringement action" (in the case of an unclean hands defense), or has demonstrated its intent to knowingly surrender its rights (in the case of forfeiture or abandonment). *Cf. Dam Things from Denmark v. Russ Berrie & Co., Inc.*, 290 F.3d 548, 560 (3d Cir. 2002) ("Abandonment occurs only if there is an intent by the copyright proprietor to surrender rights in his work."); *FMC Corp.*, 369 F. Supp. 2d at 581–84 ("The duty to bring an action for alleged copyright infringement does not arise until the plaintiff learns of the alleged infringement. [Thus], the laches defense is reserved for those rare cases where a protracted acquiescence by plaintiff induces a defendant to undertake substantial activities in reliance on the acquiescence. … The defense of unclean hands in a copyright infringement action is recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement

[1] As addressed above, Defendant's laches defense independently fails as a matter of law pursuant to Supreme Court precedent since Plaintiff commenced its action within the applicable statute of limitations. *Accord, e.g.*, *Petrella*, 134 S.Ct. at 1972–73.

action. The unclean hands defense should be rejected when the plaintiff's transgression is of an extraneous, immaterial, or inconsequential nature, or possibly when the defendant has been guilty of conduct more unconscionable and unworthy than the plaintiff's.").

Again, Defendant wholly fails to allege *any* facts whatsoever in support of these rarely applicable defenses; there is plainly no alleged basis to find that Defendant's infringing conduct was induced by and resulted from Plaintiff's "protracted acquiescence" or that Plaintiff itself has engaged in some sort of serious transgression directly related to Defendant's infringing activities. Nor is there any basis for inferring that Plaintiff indicated to Defendant that it would forfeit or abandon its rights in its copyrighted works. Indeed, Defendant's answer itself makes clear that, prior to this action, he and Plaintiff were complete strangers who had never communicated, and that Defendant has not relied on any act or omission by Plaintiff. Quite obviously, then, Defendant's inadequately-alleged fourth, fifth, sixth, fourteenth, and sixteenth affirmative defenses are insufficient as a matter of law and cannot survive the instant motion to strike. *Accord Malibu Media, LLC v. Lee*, No. 12–03900, 2013 WL 2252650, *9 (D. N.J. May 22, 2013) ("Defendant has insufficiently pled a defense of unclean hands. Such a defense is meant to relate directly to the offense in issue—in this case, the actual copyright infringement alleged. As the facts cited by Defendant do not appear to relate to the actual act of infringement, … the Court will strike Defendant's affirmative defense."); *Dann v. Lincoln Nat'l Corp.*, 274 F.R.D. 139, 145–46 (E.D. Pa. 2011) (granting a motion to strike laches defense because the defendant did not present the elements of a claim of laches or allege any supporting facts); *Huertas v. U.S. Dept. of Educ.*, No. 08–3959, 2009 WL 2132429, *3 (D. N.J. July 13, 2009) (noting that in order to overcome a motion to strike, an affirmative defense of laches must be adequately plead by alleging that plaintiff inexcusably delayed in instituting suit and that defendant has suffered resulting prejudice from the delay).

D. Defendant's Tenth, Eleventh, Twelfth, Thirteenth, Fifteenth, and Seventeenth Affirmative Defenses

Defendant's remaining affirmative defenses similarly fail since they are either wholly unsupported and inadequately alleged, inconsistent with Defendant's answer, or otherwise mere denials of Plaintiff's complaint allegations and not true affirmative defenses. Defendant's tenth affirmative defense is that "[t]he contents of plaintiff's works are in the public domain." Material is said to lie in the public domain if it is uncopyrightable (as is the case with general plot ideas and themes) or if the material's copyright has expired. *See Tanikumi v. Walt Disney Co.*, No. 14-5877, 2015 WL 716429, *3 (D. N.J. Feb. 19, 2015). Yet in alleging *prima facie* direct copyright infringement, Plaintiff has already sufficiently alleged that it holds valid copyright registrations for the eighteen at-issue films, none of which are in the public domain and none of which Defendant was authorized to unlawfully download and distribute. Consequently, it makes no sense to apply this affirmative defense in the context of this suit; the defense is merely a denial of Plaintiff's claims. *See Black's Law Dictionary* (9th ed. 2009) (noting that an affirmative defense is not a denial as to liability or to a complaint's allegation but is an "assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claims, *even if all the allegations in the complaint are true.*"); *Sterten v. Option One Mortg. Corp.*, 479 F. Supp. 2d 479, 482 (E.D. Pa. 2007) ("An affirmative defense is an assertion raising new facts and arguments that, if proven, defeat the plaintiff's claim even if the allegations in her complaint are true. In other words, assuming a plaintiff's factual allegations make out a cause of action, an affirmative defense bars it. On the other hand, a matter that merely negates an element of the plaintiff's prima face case is not an affirmative defense."). *See also HCRI TRS Acquirer, LLC v. Iwer*, 708 F.Supp.2d 687, 690 (N.D. Ohio 2010) (noting that in order to survive a motion to strike, an affirmative defense must be properly pleaded as such). Moreover, the defense would only apply if Defendant admitted having downloaded Plaintiff's works. Yet Defendant's answer repeatedly denies having ever downloaded or distributed Plaintiff's works as alleged. *Accord, e.g.*, *Malibu Media, LLC v. Doe*, No. 1:13-cv-30, 2013 WL 4048513, *4 (N.D. In. Aug. 9, 2013) ("In this case, Defendant's Answer forecloses the possibility of an implied license defense [because]

Defendant denies [using BitTorrent to distribute copyrighted work]. With this general denial, Defendant appears to be denying not only that he copied and distributed the parts of Plaintiff's copyrighted works, but that he used BitTorrent to do so. As such, Defendant cannot demonstrate that he requested Plaintiff's work via BitTorrent, that Plaintiff delivered the work, and that Plaintiff intended Defendant to distribute it, as required to establish an implied license defense."); *Malibu Media, LLC v. Batz*, No. 12-cv-01953, 2013 WL 2120412, *5 (D. Colo. April 5, 2013) (same): *see also Collura*, 2014 WL 3437733 at *26; *TruePosition, Inc. v. LM Ericsson Tele. Co.*, 977 F.Supp.2d 462, 474 (E.D. Pa. 2013); *Geppert Bros.*, 638 F.Supp. at 998.

Defendant's thirteenth affirmative defense, which summarily and vaguely states that "[a]ny copying or use of any of plaintiff's works by defendant was fair use," fails for the reasons. Plainly, there are no inferable facts from which to even believe that this defense would ever apply. The fair use defense is an "equitable rule of reason" that allows a would-be infringer to infringe for "purposes such as criticism, comment, news reporting, teaching, scholarship, or research." *E.g.*, *Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters.*, 533 F.3d 1287, 1307–08 (11th Cir. 2008) (citing 17 U.S.C. § 1067). It is the Defendant's burden, as the alleged infringer, to adequately allege (and ultimately prove) that his infringement serves such a legitimate purpose. *See id.* Here, not only does

Defendant fail to state the required plain and short statement of supporting facts, but his answer effectively denies infringing to begin with, making a fair use defense entirely consistent with, and antithetical to, his answer.

Defendant's eleventh affirmative defense is that "[t]he copyrights to plaintiff's works were not properly registered." Again, though, this is not an affirmative defense, but merely a denial of Plaintiff's *prima facie* allegations that it holds valid copyrights on the eighteen at-issue works. *Cf. Black's Law Dictionary* (9th ed. 2009) (noting that an affirmative defense is not a denial as to liability or to a complaint's allegation but is an "assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claims, *even if all the allegations in the complaint are true.*"); *Sterten*, 479 F. Supp. 2d at 482 ("An affirmative defense is an assertion raising new facts and arguments that, if proven, defeat the plaintiff's claim even if the allegations in her complaint are true. In other words, assuming a plaintiff's factual allegations make out a cause of action, an affirmative defense bars it. On the other hand, a matter that merely negates an element of the plaintiff's prima face case is not an affirmative defense.").

Defendant's twelfth affirmative defense is that "[a]ny copying or use of any of plaintiff's works by defendant was de minimis." The Court can readily note that this defense is inconsistent with Plaintiff's well-plead complaint allegations that Defendant continuously infringed eighteen of Plaintiff's complete copyrighted movies over a seven-month period from December 2013 through June 2014 [CM/ECF 11]. If Plaintiff proves its claims, the Copyright Act entitles it to recover statutory damages ranging from $13,500 to $2,700,000. In any case, as a matter of law, such systematic infringement is not and could never be deemed *de minimis*. Consequently, Defendant's twelfth affirmative defense is merely a denial of Plaintiff's claims and must be stricken.

Defendant's fifteenth affirmative defense is that "Plaintiff has misused its rights of the works alleged in the Complaint." The doctrine of copyright misuse, which "extends from the equitable principle that courts may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest," *Video Pipeline, Inc. v. Buena Vista Home Enter., Inc.*, 342 F.3d 191, 204 (3d Cir. 2003), "forbids the use of a copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office and which it is contrary to public policy to grant." *Video Pipeline, Inc. v. Buena Vista Home Enter., Inc.*, 275 F. Supp. 2d 543, 557 (D. N.J. 2003). This defense must be stricken for a number of reasons and first and foremost because the Third Circuit has not affirmatively recognized copyright misuse as a viable affirmative defense to infringement. *See Video Pipeline*, 342 F.3d at 203 ("Neither the Supreme Court nor this Court has affirmatively recognized the copyright misuse doctrine."); *Dun & Bradstreet Software Servs., Inc. v. Grace Consluting, Inc.*, 307 F.3d 197, 221 (3d. Cir. 2002)

("This Court has not yet addressed the legal viability of the copyright misuse as a defense."); *Arista Records,* 356 F. Supp. 2d at 428 ("[T]he defense of copyright misuse has rarely been upheld as a defense to a claim of copyright infringement."); *Warner/Chappel Disc, Inc. v. Pilz Compact Disc, Inc.*, No. CIV. A. 99–293, 1999 WL 999332, *6 n.5 (E.D. Pa. Oct. 26, 1999) ("[T]he Court would not permit an affirmative claim of copyright misuse to go forward. There is no authority in this Circuit for such a claim ….").

Even assuming that the doctrine were recognized in the Third Circuit, the defense, "which has rarely been upheld as a defense to a claim of copyright infringement," only applies when the copyright holder uses its copyright in a manner antagonistic to the Copyright Act's public policy of promoting the progress of science and arts, typically by having "engaged in some type of anti-competitive behavior, such as using a license to the copyright in an anti-competitive manner." *Video Pipeline, Inc.*, 342 F.3d at 204–05; *FMC Corp. v. Control Solutions, Inc.*, 369 F. Supp. 2d 539, 582 (E.D. Pa. 2005); *Warner/Chappel Disc, Inc. v. Pilz Compact Disc, Inc.*, 1999 WL 999332 at *5 ("In asserting the defense, a copyright infringer would argue that their infringement is justified because the copyright holder was enforcing its rights in copyrighted materials in such a way as to violate antitrust laws or in any other manner violative of the public policy embodied in the grant of a copyright."). Consistent with its rationale, the copyright misuse defense contemplates a copyright holder's attempt to impermissibly use its copyrights "to control competition in an area outside the copyright." *E.g.*, *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 979 (4th Cir. 1990).

Here, Defendant fails to even implicitly suggest that these prerequisites are met; Defendant does not and cannot allege that Plaintiff has engaged in *any* anti-competitive behavior or has otherwise sought to secure an exclusive right or limited monopoly not authorized by the Copyright office. Not only does Defendant's fifteenth affirmative defense not contain the requisite short and plain statement of facts, but his Answer as a whole fails to allege or even intimate a factual basis for application of the misuse doctrine. There are plainly no set of facts which may be reasonably inferred from Defendant's allegations to support a misuse defense, and same should thus be stricken as legally insufficient. *Accord Collura*, 2014 WL 3437733 at *26 (noting that an affirmative defense may stricken as insufficient pursuant to Rule 12(f) "where it cannot succeed under any set of facts which may be inferred from the allegations of the pleading[s]."); *Geppert Bros.*, 638 F.Supp. at 998 (encouraging courts to strike affirmative defenses as insufficient when they "cannot succeed under any set of facts which may be inferred from the [defendant's] allegations").

For the same reasons, Defendant's final affirmative defense fails. Defendant's seventeenth affirmative defense is that "Plaintiff's Complaint is frivolous." That is all Defendant states; he does not identify, how or why Plaintiff's complaint is frivolous, nor does he even dispute that Plaintiff has adequately alleged a *prima facie* case for direct copyright infringement, sufficient to survive a Rule 12(b)(6) motion to dismiss. The Court must independently acknowledge that Plaintiff's complaint is of course not frivolous. This defense must be stricken.

III. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that the Court enter an order striking with prejudice Defendant's affirmative defenses, and granting to Plaintiff any additional and further relief that the Court deems just and equitable under the circumstances. A proposed order granting the requested relief is attached hereto as an exhibit.

Respectfully submitted,

By: /s/ *Patrick J. Cerillo*

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ *Patrick J. Cerillo*